Navigating NIMBY

A Public Official's Guide to Neighborhood Living for People with Disabilities

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Summer 2003

This publication has been prepared, printed and distributed with funds from the U.S. Department of Housing and Urban Development and the Tennessee Department of

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Introduction

There are few situations more difficult for public officials than “Not in My Back Yard” (or “NIMBY”) disputes that arise when homeowners want to keep housing or facilities for people with disabilities out of their neighborhoods. Officials must weigh the neighbors’ wishes to control their surroundings against the rights of those seeking to provide housing for their most vulnerable constituents. The conflicts that often ensue force public officials to ask themselves difficult political, legal and ethical questions about responsible - and responsive - governance.

This handbook provides public officials with the information they need to make educated decisions that will keep them on the correct side of the law. It is also intended to provide strong, research-based, factual information that can give officials confidence that following the law will not lead to the negative consequences neighborhood residents often fear. This information should also help them educate their constituents about the realities of housing for people with disabilities to perhaps pave the way for smoother and more neighborly coexistence.

This handbook also has some suggestions on how public officials can fulfill their roles as administrators or elected officials to plan for, educate about and regulate homes for people with disabilities.

Respecting and upholding the fair housing rights of people with disabilities does not occur at the expense of the quality of life in a neighborhood or a city. It enhances it. We hope you will find this guide helpful as you deal with the competing concerns of fair housing, land-use control and homeowner objections.

Acknowledgments

The Tennessee Fair Housing Council would like to acknowledge the assistance of the following individuals:

Virginia Trotter Betts
Commissioner of the Tennessee Department of Mental Health and Developmental Disabilities (TDMHDD)

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Staff Attorney, Tennessee Fair Housing Council

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CHAPTER ONE – The Law as it Applies to Housing and Other Facilities for People with Disabilities

A number of statutes and court decisions provide guidance on whether and how governments can regulate or restrict housing for people with disabilities. As you will see, both state and federal law strongly support the rights of people with disabilities to live in appropriate housing, even in traditional residential neighborhoods.

The bulk of the law we will examine in this chapter comes from a statewide zoning law and three key federal civil rights statutes, at least one of which dates from the early 70s. In most respects, the law is well settled and has been for several years; however, litigation continues.

State law

While most of the statutes regarding discrimination against housing for people with disabilities are federal, municipal policy makers will find most helpful a *state* statutory provision that reads as follows:

> For the purposes of any zoning law in Tennessee, the classification "single family residence" includes any home in which eight (8) or fewer unrelated mentally retarded, mentally handicapped or physically handicapped persons reside, and may include three (3) additional persons acting as houseparents or guardians, who need not be related to each other or to any of the mentally retarded, mentally handicapped or physically handicapped persons residing in the home.[1]

This provision *overrides any local zoning regulations to the contrary*[2] and means that homes for fewer than eight people with disabilities and three caretakers must be treated as though they are single-family homes. This means they can generally locate in any residential neighborhood as a

[1] TENN. CODE § 13-24-102.

[2] TENN. CODE ANN. § 13-24-103.

matter of right without seeking relief from zoning regulations, such as a variance or a special-use permit. They also may not be subjected to any special requirements (such as fire safety equipment) or procedures (public hearings) to which other single-family homes do not have to submit.

However, the single-family classification does not apply to "such family residences wherein handicapped persons reside when such residences are operated on a commercial basis."[3] In 1982, the Tennessee Court of Appeals discussed the boundaries of commercial operation in Nichols v. Tullahoma Open Door, Inc.:[4]

> [T]he statutory scheme did not seek to exclude a group home not operating for profit ... on the basis that it was operating as a commercial business simply because defendant received subsidies and rent to repay the mortgage loan and to pay staff members. No commercial purpose for the group home has been shown and we are of the opinion that the home is not operating on a commercial basis.[5]

The import of this case is that providers of housing for eight or fewer people with disabilities that is operated on a non-profit basis will be protected by this state zoning law. However, for-profit providers (and providers of housing for more than eight people) are still protected by the Fair Housing Act, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 and have the right to request relief from zoning requirements as a reasonable accommodation to their residents with disabilities. Reasonable accommodations and these federal statutes will be discussed in detail below.

The court in the Nichols case also rejected a challenge to the statute's constitutionality, holding that the statute was not an unconstitutional taking of property,[6] did not usurp local governments' zoning powers[7] and did not violate equal protection by granting rights to people with

[3] TENN. CODE ANN. § 13-24-104.

[4] 640 S.W.2d 13 (Tenn. App. 1982)

[5] *Id.* At 17.

[6] *Id.*

[7] *Id.* at 18.

disabilities that were not granted to others.[8]

Federal Law

A. The Fair Housing Act

Before 1988, the law regarding discrimination in housing against people with disabilities was a patchwork of state laws and local ordinances. Providers of housing for people with disabilities had some success in fighting local governments' discriminatory zoning decisions by challenging them on constitutional grounds in federal court.[9] Others could sue on the basis of laws in their own states or cities.

However, in 1988 Congress passed the Fair Housing Amendments Act of 1988,[10] which amended the federal Fair Housing Act[11] to add protection from discrimination on the basis of "handicap" (which is legally synonymous with "disability," the term we will use throughout this guide) and familial status, which means the presence or anticipated presence of children under 18 in a household.

The Act was intended to address zoning decisions, restrictive covenants, and conditional or special-use permits "that have the effect of limiting the ability of [people with disabilities] to live in the residence of their choice in the community."[12] Thus, Congress explicitly made zoning an issue in the 1988 amendments, though the Act also applies to discrimination in a variety of other housing transactions.

The Act defines "handicap" as:

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[8] *Id.*

[9] *See* especially City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

[10] Pub. L. 100-430, 102 Stat. 1619 (1988). The legislative history of the Act makes extensive reference to the City of Cleburne case.

[11] 42 U.S.C. §§ 3601 *et seq.* The act now prohibits discrimination on the basis of race, color, national origin, religion, sex, disability and familial status.

[12] H.R. REP. NO. 711, 100th Cong., 2d Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

> (1) A physical or mental impairment which substantially limits one or more of a person's major life activities;
>
> (2) a record of having such an impairment; or
>
> (3) being regarded as having such an impairment.[13]

For purposes of this discussion, there are three major legal theories under the Fair Housing Act with special relevance to the siting of housing for people with disabilities.

First, the Act broadly prohibits discrimination against people with disabilities by making it illegal to refuse to rent, sell or negotiate; to discriminate in "terms and conditions"; to lie about the availability of housing; or to "otherwise make unavailable or deny" housing to them because of their disabilities. This is often called **discriminatory** or **disparate treatment**.

Second, the Act prohibits enforcement of facially neutral rules or policies that have the effect of discriminating against members of a protected class. This is usually called **discriminatory** or **disparate impact**.

Third, the Act creates an affirmative obligation on local governments to provide a "**reasonable accommodation**" for housing for people with disabilities, usually in the form of a zoning change or waiver of other local policy or rule where necessary.

We will examine these three broad categories in more detail.

Prohibitions against discriminatory treatment

The Fair Housing Act prohibits a range of practices that would prevent a person with a disability from obtaining housing or engaging in a housing-related transaction because of that person's disability. Simply stated, the law does not allow housing providers to treat people unfairly simply because they have a disability. Individuals are protected from such practices as discriminatory advertising, lying about the availability of housing, discriminatory financing or insurance underwriting, intimidation and harassment.

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[13] 42 U.S.C. § 3602(h).

In the context of housing for groups of people with disabilities, this kind of discrimination traditionally has taken the form of private restrictive covenants or zoning regulations that specifically prohibit housing for people with disabilities. It can also take the form of discriminatory application or enforcement of a rule or policy, especially when accompanied by pressure from constituents based on the disabilities of the residents. We will examine further examples of these kinds of discrimination below.

Discriminatory impact

A "discriminatory impact" (also variously known as "disparate impact," "adverse impact" or "discriminatory effect") occurs when an apparently neutral policy or procedure results in discrimination based on disability.

A plaintiff in a fair housing case can lay the groundwork for a claim of discrimination simply by showing the more burdensome effect such a policy has on him because of his disability, or on people with disabilities generally. It is helpful, but not necessary, to the plaintiff's case to show evidence of intent to discriminate. However, a city can answer that claim by showing that its actions furthered a legitimate governmental interest and that there was no alternative that would serve that interest with a less discriminatory effect.[14] Courts then weigh the discriminatory impact of the policy against the city's justification for its policies.[15]

"Reasonable accommodation"

A "reasonable accommodation" is a modification or waiver of "rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling."[16] Under this theory, people with disabilities are entitled to a favored status, because they must reasonably be

[14] *See, e.g.,* Oxford House, Inc. v. Town of Babylon, 819 F. Supp.1179, 1183 (E.D. NY 1993), Tsombanidis v. City of West Haven, 180 F.Supp 2d 262, 290 (D. Ct. 2001)

[15] *Id.*

[16] 42 U.S.C. § 3603 (f)(3)(B)

accommodated in ways that people without disabilities need not be.[17]

On an individual basis, a reasonable accommodation might entail an apartment complex allowing a blind person to have a guide dog even if the complex has a policy against pets. But as it applies to the siting of housing for people with disabilities, the Act's requirement of a reasonable accommodation has been held to require local governments to grant the zoning relief necessary to allow housing for people with disabilities to locate in an area zoned for single-family homes, even though other unrelated groups, such as students, may legally still be barred from such areas.[18] Application of the reasonable accommodation provisions has also resulted in waivers of specific kinds of zoning requirements, such as density, spacing, signage and public hearing requirements.

B. Case law under the federal Fair Housing Act

As one might expect, much litigation followed passage of the 1988 amendments to the Fair Housing Act as providers of housing for people with disabilities sought to challenge such barriers to siting as "single-family" zoning that prevents a group home from locating where only groups of related people had been permitted;[19] spacing requirements prohibiting housing for people with disabilities within a certain distance of existing housing;[20] special safety and health rules that apply only to homes for people with disabilities;[21] burdensome procedural requirements for such homes;[22] state enforcement of private restrictive covenants,[23]

[17] ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION p. 11-71 (2000)

[18] *Id.*

[19] *See* especially City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995). This case will be discussed in more detail below.

[20] *See, e.g.,* N.J. Rooming & Boarding House Owners v. Asbury Park, 152 F.3d 217 (3d Cir. 1998)

[21] *Id.*

[22] *Id.*

[23] *See, e.g.,* Hill v. The Community of Damien of Molokai, 911 P.2d 861 (N.M. 1996); Martin v. Constance, 843 F.Supp. 1321 (E.D. Mo. 1994)

and protests by neighbors. We will examine each of these major areas of litigation in more detail.

Single-family zoning

Plaintiffs seeking to challenge the discriminatory zoning decisions of municipalities have had significant success in court. One of the most significant recent cases was *City of Edmonds v. Oxford House, Inc.*[24] The group home[25] in this case was occupied by ten to twelve recovering drug addicts. The home had been denied permission to remain in a neighborhood zoned for single families, which Edmonds' zoning ordinance defined as an unlimited number of people who are related or up to five unrelated adults. Oxford House sued when the city failed to make a reasonable accommodation by allowing the group home to remain in the neighborhood despite its having more than five unrelated residents.

The city argued that language in the Fair Housing Act that exempted "reasonable occupancy restrictions" from scrutiny protected the city from a Fair Housing Act challenge. However, the Supreme Court ruled in favor of Oxford House, finding that Edmonds' rule was not an occupancy restriction, since occupancy restrictions "ordinarily apply uniformly to all residents of all dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding."[26] Under the restriction Edmonds tried to use to keep Oxford House out of a single-family residential zone, "(s)o long as they are related 'by genetics, adoption, or marriage,' any number of people can live in a house."[27]

Other cases have involved the failure of municipalities to waive zoning regulations because of political pressure from neighborhood groups. For

[24] 514 U.S. 725 (1995)

[25] In its promotional materials, Oxford House describes itself as "a concept in recovery from drug and alcohol addiction. In its simplest form, an Oxford House describes a democratically run, self-supporting and drug-free group home." Published on the Internet at http://www.oxfordhouse.org. People recovering from addictions to controlled substances are considered "handicapped" under the Fair Housing Act. 24 C.F.R. § 100.201(d).

[26] 514 U.S. at 733.

[27] *Id.* at 736.

example, in *Oxford House, Inc. v. Town of Babylon*,[28] the city in question had sought to evict an Oxford House facility from a single-family zone and denied Oxford House's request for a reasonable accommodation in the form of a modification in the city's definition of "family." The court held in that case that Oxford House's request was reasonable and that the city's failure to accommodate it was a violation of the Fair Housing Act.

Ordinarily, unless a home for people with disabilities is entitled to move into a neighborhood as a matter of right because it is consistent with the existing zoning, it is not necessarily illegal to require all housing providers to seek a special-use permit, variance or some other zoning relief before locating. In *United States v. Village of Palatine*,[29] a group home sought to locate in a single-family residential zone without first seeking a variance, fearing that the required public hearing would ignite a "firestorm of vocal opposition" that would be harmful to the residents. The operators of the home argued that the routine administrative hoops placed before them constituted illegal discrimination and that the city should waive them as a reasonable accommodation. However, the court held that the home's interest in shielding its residents from public protest "does not outweigh the Village's interest in applying its facially neutral [zoning] law to all applicants for special use approval."[30]

The court also held, however, that a home need not pursue a zoning variance when the variance process is required of housing for people with disabilities but not other housing, when the procedure is applied in a discriminatory way, or when the process is "manifestly futile"[31] as evidenced by the fact that a city appears to be in the habit of rejecting requests for zoning relief because of community opposition or other considerations.

A municipality is not required to grant a variance or some other zoning relief in every case. Representatives of a group home must show that a reasonable accommodation is needed because of the disabilities of the actual or prospective residents, and that without the accommodation people with disabilities would be denied the opportunity to enjoy equal housing in the community of their choice. Further, the municipality can

[28] 819 F. Supp.1179 (E.D. N.Y. 1993)

[29] 37 F.3d 1230 (7th Cir. 1994)

[30] *Id.* at 1234.

[31] *Id.*

reject a request for zoning relief if it would constitute a "fundamental alteration" or "undue burden." The opposition of neighbors is not enough justification. However, in one case a court held that a city could reject a rezoning request if the housing sought to be located would cause traffic congestion or demands on drainage or sewerage.[32]

Municipalities should make sure that these kinds of legitimate zoning considerations are demonstrable and not hypothetical and that they are not motivated by an intent to discriminate.

Dispersion requirements

One of the bedrock principles behind the Fair Housing Act's protections for housing for people with disabilities is that the residents should be able to live in an integrated residential setting of their choice. However, this principle often has been defeated by municipal rules that require a certain amount of space between facilities (otherwise known as dispersion requirements). Most courts, among them the federal circuit that includes Tennessee, have held that cities may not impose dispersion requirements on housing for people with disabilities.[33]

Though the stated purpose of dispersion requirements is often to aid the integration of people with disabilities into communities and to prevent "ghettoization" of housing for people with disabilities, "integration is not a sufficient justification for maintaining permanent quotas under the FHA or the FHAA, especially where, as here, the burden of the quota falls on the disadvantaged minority. ... The FHAA protects the right of individuals to live in the residence of their choice in the community...If the state were allowed to impose quotas on the number of minorities who could move into a neighborhood in the name of integration, this right would be vitiated."[34]

Indeed, "(a)s a society, we have rejected spacing and density restrictions

[32] Hovsons, Inc., v. Township of Brick, 89 F.3d 1096 (3d Cir. 1996)

[33] *See, e.g.,* Larkin v. State of Michigan, 89 F.3d 285 (6th Cir. 1996). *But see* Familystyle of St. Paul v. City of St. Paul, Minnesota, 923 F.2d 91 (8th Cir. 1991), holding that St. Paul's dispersion requirements were permissible because they promoted community integration instead of segregation and clustering. This is clearly the minority view.

[34] Larkin, 89 F.3d at 291.

applied to families on the basis of race, religion and national origin,"[35] and thus similar restrictions on the basis of disability should be rejected as well. The Fair Housing Act protects people with disabilities to at least the same extent it does the other six protected classes.

Special safety and procedural rules for housing for people with disabilities

Because of unsupported fears about community safety and concerns about resident safety, municipalities have often either barred housing for people with disabilities altogether or grudgingly allowed homes for people with disabilities and other arrangements on the condition that they comply with onerous safety and other procedures not required of other congregate living arrangements. Courts that have dealt with this issue have generally struck such requirements down as discriminatory.

1. Measures for the safety of the community

In *Bangerter v. Orem City, Utah*,[36] the city had imposed two conditions on a group home for mentally retarded adults. First, the city told the home it must give assurances that the home would be supervised 24 hours a day. Second, the city ordered the home to establish a community advisory panel to deal with complaints from neighbors. The city imposed no such requirements on any other communal living arrangement, and the court held that these requirements amounted to intentional discrimination under the Fair Housing Act that must be "justified by public safety concerns."[37]

However, public safety concerns must be reasonable and not predicated on stereotypes about people with disabilities. Though the Fair Housing Act does not protect individuals "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others,"[38] municipalities may not base decisions about housing for people with disabilities simply because of an assumption that people with disabilities

[35] CAMERON WHITMAN AND SUSAN PARNAS. FAIR HOUSING: THE SITING OF GROUP HOMES FOR THE DISABLED AND CHILDREN 17 (1999), available at http://www.bazelon.org/cpfha/grouphomes.html

[36] 46 F.3d 1491 (10th Cir. 1995)

[37] *Id.* at 1503

[38] 42 U.S.C. 3604(f)(9).

are dangerous. In *Township of West Orange v. Whitman*,[39] a court rejected the township's and local homeowners' claims that they should be consulted before housing for people with mental illness is allowed to locate in their neighborhoods and their request to receive information on the histories of people placed in this housing.

2. Measures to protect the residents

Municipalities may not prescribe burdensome safety requirements for housing for people with disabilities unless they are specifically tailored to the specific population in the housing. In *Marbrunak, Inc., v. City of Stow, Ohio*,[40] the city's zoning code included "nearly every safety requirement that one might think of as desirable to protect persons handicapped by any disability - mental or physical."[41] The result, the court said, was "an onerous burden which has the effect of limiting the ability of these handicapped individuals to live in the residence of their choice."[42] Therefore, the ordinance was held to be discriminatory on its face.

Restrictive covenants

Covenants that restrict neighborhoods to residential uses only are vulnerable to attack under the Fair Housing Act where they are used as a barrier to housing for people with disabilities. In at least one case, *Martin v. Constance*,[43] the court held that neighbors violated the Fair Housing Act when they sued the state to bar a group home, claiming the home would be in violation of a neighborhood covenant restricting homes to single-family occupancy. The court held the neighborhood had discriminatory intent when it sued to stop the home; that the covenant had a discriminatory effect on housing for people with disabilities; and that the

[39] 8 F. Supp. 2d 408 (D.NJ 1998).

[40] 974 F.2d 43 (6th Cir. 1992)

[41] *Id.* at 46-48.

[42] *Id.* at 48.

[43] 843 F. Supp. 1321 (E.D. Mo. 1994). *See also, e.g.,* Hill v. The Community of Damien of Molokai, 911 P.2d 861 (N.M. 1996); Broadmoor San Clemente Homeowners Ass'n v. Nelson, 30 Cal. Rptr.2d 316 (Cal. App. 1994); Deep East Regional Mental Health and Mental Retardation Services v. Kinnear, 877 S.W.2d 550; U.S. v. Wagner, 940 F. Supp. 972 (N.D. Texas 1996)

neighborhood failed to reasonably accommodate the group home when it filed suit to enforce its covenants. (The First Amendment implications of homeowner lawsuits to stop housing for people with disabilities will be discussed further below.)

The court's decision relied heavily on legislative history and the regulations promulgated by the U.S. Department of Housing and Urban Development, which prohibit "(e)nforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin."[44]

Free speech issues

Community members have a First Amendment right to speak out against the development of housing for people with disabilities or other housing to which they object. Such protected activity includes petitioning elected officials to stop the development of such housing.[45]

It also includes filing lawsuits to block development, unless the suits are filed for an illegal objective; without a reasonable basis in law or fact; and with an improper motive. Lawsuits such as these are not only unprotected by the First Amendment, they can themselves be violations of the Fair Housing Act.[46]

Neighbors *do not* have the right to engage in direct harassment of residents or other activity not protected by the First Amendment. They

[44] 24 C.F.R. 100.80 (b)(3).

[45] *See, e.g.,* White v. Lee, 27 F.3d 1214 (9th Cir. 2000)

[46] U.S. v. Wagner, 940 F. Supp 972 (N.D. Texas 1996). *See also* White, 27 F.3d at 1232 (a lawsuit "can amount to a discriminatory housing practice only in the event that (1) no reasonable litigant could have realistically expected success on the merits, and (2) the plaintiffs filed the suit for the purpose of coercing, intimidating, threatening, or interfering with a person's exercise of rights protected by the FHA."); Schroeder v. De Bertoloe, 879 F. Supp. 173, 178 (D. P.R. 1995) ("plaintiffs' allegations that defendants ... brought groundless civil claims against decedent, and threatened to bring groundless criminal charges against her ... are sufficient to state a claim under the FHAA.).

may not physically obstruct construction or trespass in an attempt to slow or halt development.

And though citizens have the right to urge their public officials to block housing for people with disabilities, those officials do not have a right to act on those requests by making a decision that discriminates or otherwise violates state or federal law.

C. Other relevant federal statutes

Title II of the Americans with Disabilities Act[47] ("ADA") and Section 504 of the Rehabilitation Act of 1973[48] ("Section 504") can also come into play in issues of zoning for housing (or other facilities) for people with disabilities.

The ADA provides, in relevant part:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.[49]

Likewise, Section 504 applies to recipients of federal funds, which includes almost all cities by virtue of their receipt of federal grants and entitlement programs, such as Community Development Block Grant funds. It provides:

> No otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. ...[50]

The zoning function of a state or local government is a "service," a

[47] 42 U.S.C. §§ 12131-12165 (1994).

[48] 29 U.S.C. § 794 (1994).

[49] 42 U.S.C. § 12132 (1994).

[50] 29 U.S.C. § 794(a) (1994)

"program" or an "activity" covered by the ADA and Section 504.[51] Thus, discriminatory application of zoning rules and discriminatory zoning decisions can be challenged under either of these statutes.

While the Fair Housing Act covers only disputes over "dwellings," the ADA and Section 504 cover a broad range of services for people with disabilities, such as treatment or drop-in centers, that need zoning relief in order to be in an appropriate location.

[51] *See, e.g.,* Innovative Health Systems, Inc., v. City of White Plains, 117 F.3d 37 (2nd Cir. 1997); MX Group Inc., v. City of Covington, 2002 U.S. App. LEXIS 11249 (6th Cir. 1998).

CHAPTER TWO - The Myths and Truths about Housing for People with Disabilities

NIMBY disputes can appear anywhere -- the inner city; new suburban subdivisions; older, established areas; integrated and homogenous communities -- but there are a few core concerns that appear regardless of the character of the neighborhood. The most commonly cited issues are the effect of homes for people with disabilities on property values, crime and "fair share."

Most residents' concerns are based on misinformation, largely built on myths about mental illness and other disabilities. Concern about falling property values can only occur if people with disabilities are seen as a "problem," a threat, as a group that will cause upheaval if "allowed into" a community. Michael Dear laments that beliefs about, for example, mental illness haven't changed significantly in the past twenty years, believing that the attitudes described in a 1972 study still hold true: most people still see "strange or disturbed behavior, particularly when it is socially visible, . . . as a threat to public safety."[52] Media images, particularly the news, can reinforce these beliefs by sensationalizing isolated incidents.

Starting from the inaccurate premise that people with disabilities are a burden on a community, most neighborhoods will fight homes for people with disabilities with a set of beliefs unsupported by evidence. In reality, homes for people with disabilities have little to no negative impact on a neighborhood's property values or on its crime rates. "Fair share" arguments rest on the assumption that people with disabilities are a burden; local governments should be sensitive to any perception that housing providers are targeting communities without political power and counter that perception with factual information about homes for people with disabilities.

[52] Rabkin, J. *Opinions about Mental Illness: A Review of the Literature* 77 PSYCHOLOGICAL BULLETIN 153-171 (1972) *cited in* MICHAEL DEAR AND ROBERT WILTON, CRIME & SAFETY: FACT & FICTION 3.

Property values

The most commonly stated concern of residents near a proposed group home is that property values will decline. For most people, their home is their biggest investment -- for many, the only significant one. Homeownership provides not only a place to live but is seen as a guarantee of future financial stability. It's not surprising that neighborhood residents will take action if they believe there is a threat to their investment.

However, the fear that homes for people with disabilities and other social services cause a decline in property values is not supported by the experience of neighborhoods throughout North America. Studies on the effects of homes for people with disabilities on property values have consistently shown that property values not only do not decline but in some cases increase.

Daniel Lauber's influential 1986 study of Illinois found no negative effect on property values. He examined 2,261 properties in Illinois for two years before and after group homes were introduced. Lauber's findings: property values rose 79% in neighborhoods with group homes, but only 71% in the control group.[53] Similarly, a 1990 review of 25 studies conducted throughout the United States found none that showed a decrease in property values or increased turnover.[54]

Studies throughout the United States and Canada show the same effect -- property values in neighborhoods with group homes increased or decreased at the same rates as those without group homes. Wolpert's study of 42 neighborhoods found, "without exception, the location of a

[53] DANIEL LAUBER, IMPACTS ON THE SURROUNDING NEIGHBORHOOD OF GROUP HOMES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES. Report prepared for the Governor's Planning Council on Developmental Disabilities. (1986) *cited in* Peter F. Colwell, Carolyn A. Dehring, and Nicholas A. Lash, *The Effect of Group Homes on Neighborhood Property Values.* LAND ECONOMICS 617 (November 2000). A summary of the Colwell/Dehring/Lash study appears online at the website of the Real Estate Counseling Group of America: http//www.recga.com/newsletter.html.

[54] COMMUNITY RESIDENCES INFORMATION SERVICES PROGRAM (CRISP). THERE GOES THE NEIGHBORHOOD (1990).

group home or community residential facility for mentally disabled people does not adversely affect property values or destabilize a neighborhood."[55]

In contrast to the hundreds of studies that found no negative effect, the number of studies that have found decreases are in the single digits. However, even these studies often show that homes for people with disabilities can't be singled out as the predominant factor in valuation. For example, one study speculated that the reason for the drop was "an initial overreaction to the group homes establishment" -- in other words, panic selling -- and that these initial decreases are eventually corrected. Intriguingly, the same study found that those neighborhoods protesting a group home found their property values dropping an additional 7% compared to those without protests.[56]

Another study that found a mix of increasing and decreasing values concluded that homes for people with disabilities weren't "a certain predictor or cause" of value changes, citing instead that the issue is far more complex, with property values determined by "prevailing neighborhood real estate valuation trends, economic recessionary forces, the location of industrial sites or major transportation highways, public school closing/opening, nearby positive or negative occurrences, felt increases/decreases in crime, increases/decreases in vacancies, etc."[57] The presence of homes for people with disabilities is only one of a wide variety of factors that can determine the value of any particular property, and should not be given particular importance.

Though neighborhood residents' concerns about property values are sincere, there is little support for those fears. The consensus among researchers, as well as the experience of communities across the country, shows that homes for people with disabilities do not lower property values.

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[55] See Robert L. Schonfeld, *"Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded*, 1 XVI FORDHAM URBAN LAW JOURNAL (1988).

[56] Colwell, Dehring, Lash *supra* note 35, at footnote 3, 619.

[57] Greater Baltimore Community Housing Resource Board, Inc., *On Residential Property Values in Baltimore County, Maryland.* (December 1993) http://www.gbchrb.org/grphomes.htm

Disabilities and crime

The second most commonly stated concern is that homes for people with disabilities, especially those whose residents have mental illnesses, increase crime in nearby areas. This idea rests largely on the popular yet baseless belief that all people with mental illness are dangerous. While research indicates there is an association between some forms of mental illness and violence, several studies have shown that the public grossly overestimates the danger, with the Surgeon General reporting the public overestimating violence by a factor of 2.5.

Part of this misconception comes from not understanding how people with mental illness find themselves in the criminal justice system. People with mental illness are often arrested and imprisoned not because they are dangerous, but because of a lack of treatment options. According to Michael Dear, communities "blocking facility developments . . . may actually perpetuate the conditions that they themselves find so disconcerting."[58]

Dear's conclusion is further supported by a consensus among researchers that people with mental illness who are receiving treatment are "no more violent than others in the community." In addition, residential homes for people with disabilities have rigorous standards for clients, keeping those with violent tendencies out of residential treatment facilities for the safety not only of the neighborhood, but also of other clients.

These conclusions are supported by many studies over the past few decades which consistently demonstrate that homes for people with disabilities do not increase crime in their neighborhoods.

Schonfeld found in a wide-ranging examination of 363 group homes that crime does not increase with the introduction of group homes for people with mental illness.[59] CRISP's 1990 summary of 58 studies of group homes and treatment facilities found the same thing.[60] Lauber's 1986

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[58] DEAR AND WILTON *supra* note 34, 4

[59] Schonfeld *supra* note 37.

[60] CRISP *supra* note 36.

Illinois study found, however, "the crime rate for residents of these homes was *lower* than that of the general population."[61]

The argument that homes for people with disabilities introduce people with mental illness into a community is flawed -- they are already there. Within any community live individuals with depression, substance abuse, personality disorders, developmental delays, schizophrenia -- and these, because they are hidden or unacknowledged, often go untreated. Homes for people with disabilities provide a continuum of care and a stable environment that leads to a greater chance of recovery from mental illness than those who remain behind closed doors, suffering silently along with their families.

The belief that homes for people with mental illness bring crime into a neighborhood is not only not supported by the evidence, but it is a flawed conclusion given the prevalence of mental illness and other disorders already existing in our communities.

Happy endings

The experience of other communities with homes for people with disabilities has shown that the effects most often cited by opponents clearly do not occur. Diana Antos Arens interviewed 75 people who lived in a Long Island neighborhood that fought the introduction of a group home. The results: after two years, the "overwhelming majority agreed that the residents are good neighbors; they have had no problems; and the residences had no adverse effects on property values."[62]

Otto Wahl found similar results, noting that one-quarter of the residents of the neighborhood he studied were unaware there was a group home nearby. Those who were aware saw no negative impact on property values, crime, or safety. Most were satisfied with the home in their neighborhood, and found that the results were far better than they had anticipated.[63]

[61] LAUBER *supra* note 35.

[62] Diana Antos Arens. *What do the neighbors think now? Community residences on Long Island, New York***.** 29 COMMUNITY MENTAL HEALTH JOURNAL. (June 1993).

[63] Otto Wahl, *Community impact of group homes for mentally ill adults.* 29 COMMUNITY MENTAL HEALTH JOURNAL. (June 1993).

The experience of a variety of communities has shown that the issues most commonly raised in opposition to the siting of a group home have no factual basis. The community's fears may certainly be sincere -- and should be treated as such -- but some advocates[64] believe part of the task of siting is to educate people in the surrounding area about the realities of mental illness and the ethical and practical implications of deinstitutionalization.

[64] For example, the National League of Cities and the Coalition to Preserve the Fair Housing Act "agree on the importance of [local government officials and advocates] working together to educate existing neighbors and other stakeholders about the housing needs of people with disabilities, and the extent to which group homes fill a portion of this need." CAMERON WHITMAN AND SUSAN PARNAS. FAIR HOUSING: THE SITING OF GROUP HOMES FOR THE DISABLED AND CHILDREN 12 (1999), available at http://www.bazelon.org/cpfha/grouphomes.html

CHAPTER THREE – The Role of Public Officials

The sometimes conflicting needs of people with disabilities and homeowners can make public officials feel as though their role is merely that of referee. While refereeing such disputes can be an important part of a public official's job, he or she has other important and positive leadership roles to play in the larger scheme of making more affordable housing available in their communities

Those roles can be roughly categorized as **planning**; **education** and **policing for health, safety and quality of life**.

Public officials regularly carry out all three of these roles in a variety of contexts already.

We will examine each of these roles and the way they might work in the context of housing for people with disabilities in more detail.

Planning

One of the most important functions public officials at all levels perform is planning. Public officials have a responsibility to analyze the housing needs of their communities. There are few communities that, after a thorough needs assessment, would conclude that there is enough affordable housing, especially for people with disabilities.

And such an assessment would make clear that merely "to be focused first on how to allocate among communities the meager amount of housing available misses the critical issue entirely."[65] Instead, local governments should concentrate on increasing the overall pool of housing options for people with disabilities in all parts of the city.

For most cities, this planning process is already in place. Cities and other local governmental entities that receive federal Community Development Block Grant ("CDBG") funds must file periodically a Consolidated Plan and an Analysis of Impediments to Fair Housing Choice ("AI"). The AI is part of a community's obligation to "affirmatively

[65] WHITMAN & PARNAS, *supra* note 64, at 29.

further fair housing." Though this obligation has never been defined in law, HUD requires CDBG grantees to:
1. Conduct an analysis to identify impediments to fair housing choice within the jurisdiction
2. Take appropriate actions to overcome the effects of any impediments identified through the analysis
3. Maintain records reflecting the analysis and actions taken in this regard.[66]

Looking carefully at barriers to housing for people with disabilities and then addressing those barriers certainly affirms fair housing, and such an examination may in fact be necessary to meet HUD's requirements for CDBG recipients.

HUD identifies NIMBY-type resistance to housing for people with disabilities as a potential impediment to fair housing choice,[67] making it imperative that entitlement jurisdictions identify such tensions and take steps to remedy them. Those steps might include examining the jurisdiction's own ordinances, policies and procedures, both formal and informal, for siting housing for people with disabilities and for addressing community objections.

Jurisdictions should also discuss in their plans "the extent to which a broad variety of accessible housing for persons with disabilities are distributed throughout the jurisdiction, demonstrating efforts made to provide such housing in an integrated setting."[68]

With respect to this requirement, cities should examine whether some neighborhoods have a higher proportion of housing for people with disabilities than others. While it is a mistake to think of such housing as a burden on those neighborhoods, homeowners in those neighborhoods may claim to be shouldering more than their "fair share." If there are economic, political or other factors that prevent a diverse distribution of housing for people with disabilities throughout the jurisdiction, city officials should take steps to address them.

Education

[66] U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FAIR HOUSING PLANNING GUIDE 1-2

[67] *Id.* at 2-17.

[68] *Id.* at 2-28.

Public education is really a continuation of the planning process. It involves getting the message out to the public that the community needs housing for people with disabilities in integrated settings.

When people with disabilities move into a group home arrangement in a residential neighborhood, one of the most prevalent complaints from homeowners nearby is that they weren't told it was going to happen.

As discussed above, in many cases there is no obligation on the part of the providers of such housing to tell **anyone** they are moving in, because the home should be treated like any other single-family home. In other cases, where a house has required a special-use permit or other zoning relief to locate in a single-family zone, there may be no public hearings as a reasonable accommodation to the prospective residents.

However, there are ample opportunities - and good reasons - for public officials to discuss homes for people with disabilities and people with disabilities **in general** with their constituents. Such public discussion can dispel the fears and myths about such housing and educate the public about the acute need for it throughout the community.

Further, "it's much easier to educate people and secure their support for housing and services when they are not fighting to keep them out of their own back yards."[69]

In some cases, housing providers will voluntarily hold community meetings, either to answer questions before a site for housing becomes an issue or to address concerns homeowners raise after they learn a site in their neighborhood has been chosen. Public officials can participate constructively in these meetings by making clear their support for development of housing for people with disabilities and their commitment to obeying federal and state law.

It is important to consider, however, whether repeated meetings about the same home are constructive. Repetitive meetings to rehash issues that have been discussed already can sometimes serve only to delay an important project and harm the chances that homeowners and the home in question can eventually develop a neighborly relationship.

Health, safety and quality of life issues

[69] Michael Allen, *Why Not in Our Back Yard?*, 45 PLANNING COMMISSIONERS JOURNAL, Winter 2002, at 5.

The Fair Housing Act and other federal statutes do not leave public officials powerless to make sure that homes for people with disabilities do not become a nuisance, or that homes that will be a nuisance do not locate in a residential neighborhood inappropriately. They can also regulate the health and safety standards of homes for people with disabilities to the extent that such regulation does not single out the homes for extra attention based on the disabilities of the people living there.

Public officials can and should take appropriate steps to address legitimate complaints that the residents of **any** home, including people with disabilities, are engaging in conduct which is dangerous, a nuisance or otherwise not in keeping with community standards. People with disabilities do not have free reign to disregard the law.

Therefore, disturbances of the peace, violent behavior, trespassing and other infractions of the law should be dealt with the same way they would be if committed by a non-disabled person. In some cases, it might be appropriate at that point for a behavior-modification plan to be worked out in lieu of eviction or some other action, if the behavior is related to a disability.

It is important to ensure that complaints are legitimate and not frivolous, especially in neighborhoods where there has been opposition to a home for people with disabilities. And those complaints should be addressed on the basis of **individual behavior**, not the disability status of all the residents in a given home. That means that neighbor complaints should not result in the closing and subsequent ban on homes for people with disabilities in the neighborhood (which may be what the neighbors want) but rather a measured, appropriate response to the problematic behavior of the individual causing problems.

Of course, local officials are responsible for addressing harassment, trespass or other criminal behavior directed **at** the residents in a home.

Municipalities also have the authority to deal with homes whose condition becomes a health hazard. Many cities have ordinances dealing with lawn and weed abatement and hazardous materials, for example, in residential zones, and there is nothing that prevents public officials from enforcing those ordinances against a group home.

However, it may be necessary for public officials to grant a reasonable accommodation, as discussed above, for certain kinds of infractions. For example, if a city ordinance puts a limit on the number of cars that can be parked on the street in front of a house, a reasonable accommodation

may be necessary if a home has staff members who need to park at the home. (And such complaints from neighbors who are already aware that the home has a staff should be viewed as potentially frivolous and part of an ongoing campaign to get the home out of the neighborhood.)

Public officials should encourage neighborhood residents to channel their complaints appropriately. Though the First Amendment guarantees every citizen's right to convey his grievances to any elected official - including members of Congress - neighbors should understand that the most effective way to deal with complaints about individuals' behavior is to call appropriate local authorities, including the police. After all, neighbors wouldn't call their Congressional representative to complain about a loud party in the college students' house across the street, so there's very little good reason for them to call him or her about tall grass at the group home next door. For them to do so indicates a potential bias on their part based on the disabilities of the home's residents.

Your city might also consider implementing a mediation process to help citizens work through neighborhood disputes. Portland, Ore., has established a "Community Residential Siting Program," whose services include technical assistance, community outreach and mediation.[70] While participation by community residences for people with disabilities should not be mandatory, many would welcome the opportunity to mediate disputes with the help of a neutral third party rather than through the intervention of police, members of Congress or city council members.

[70] City of Portland Civic Involvement Center, on the Internet at http://www.myportlandneighborhood.org/civic.html

Conclusion

No public official wants to be caught in the middle of a NIMBY dispute. However, such disputes are typical of what public officials deal with every day - competing concerns that demand a solution that will not please everyone (at least not at first) but that recognizes the legal rights of all parties involved.

But as this handbook has shown, public officials need not - and probably should not - sit passively by and wait for disputes to erupt. And when they do, there are many ways public officials can help to solve them. Good zoning policy, solid community education, sound planning and evenhanded policing can help your community evolve in a way that addresses many of the wants and needs of your constituents - **all** of them.

Resources

The resources listed below supplement those listed in the footnotes of this handbook.

The National Fair Housing Advocate Online
http://www.fairhousing.com

Building Better Communities Network
http://www.bettercommunities.org

U.S Department of Housing and Urban Development
http://www.hud.gov

City of Portland, Oregon's Community Residential Siting Program
http://www.myportlandneighborhood.org/programs/civic_involvement center/CRSP/CRSP_index.htm

State of New Jersey, Good Neighbors: Community Living for People with Disabilities
http://www.state.nj.us/humanservices/Goodneighbors/goodneighbors.html

Joint Statement of The Department of Justice And The Department of Housing And Urban Development: Group Homes, Local Land Use, and the Fair Housing Act

http://www.usdoj.gov/crt/housing/final8_1.htm